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Serial No.: 10/718,642
January 14, 2010
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PATENT
Filed: November 24, 2003

As part (B) mandates, if "the international application was filed on or after November 29, 2000, but did not designate the United States or was not published in English under PCT Article 21(2), do not treat the international filing date as a U.S. filing date. In this situation, do not apply the reference as of its international filing date, its date of completion of the 35 U.S.C. 371 (c)(1), (2) and (4) requirements, or any earlier filing date to which such an international application claims benefit or priority" (emphasis in original).

As the enclosed page printed out from the WIPO website reveals, the Bogward PCT was published in German. As part (B) of the above-cited portion of the MPEP requires, under these circumstances the PCT filing date cannot be used; instead, the Bogward publication date in the U.S. in English must be used. Since that publication date deprives Bogward of prior art status against the instant application, the rejections are overcome.

The examiner has attempted to circumvent this clear mandate from the MPEP against using Bogward under the circumstances of this case by the expedient of declaring that Bogward is being used as a translation of the earlier PCT. This, of course, is nonsense, since it would make the MPEP injunction noted above nugatory: every U.S. application claiming priority from an earlier non-English PCT would then fit the bill proposed by the examiner.

The problem with the examiner's gambit is quite simple. A certified translation from a professional translator is accorded deference as evidence of what the underlying non-English document contains, but an English language application purportedly derived from an earlier non-English PCT is not because (1) it is not attested to by a certified translator; (2) it may in fact contain additional subject matter not contained in the non-English PCT; and (3) evidence exists *on the present record* that Bogward *manifestly is not* a literal translation of the earlier non-English PCT, e.g., the only thing in English in the earlier PCT - the abstract - has

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not been carried over verbatim into the abstract of Bogward. In fact, the Bogward abstract has been reworded compared to that of the PCT to change the import of the original PCT abstract, namely, by changing that an input "surface" is provided "according to the execution of at least one program" to an input "area" the functional zones of which "depend" on a program. Given that Bogward manifestly recast the *only* English passage in the otherwise non-English PCT, there is doubt as to what else it might have changed or added with respect to the non-English PCT. Bogward thus is not a certified translation of the earlier PCT nor is it entitled to any presumption to the contrary.

The Examiner is cordially invited to telephone the undersigned at (619) 338-8075 for any reason which would advance the instant application to allowance.

Respectfully submitted,

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